

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ERNEST DEMETRIUS EVANS,
Plaintiff,
v.
CONNIE EISEN, et al.,
Defendants.

No. 2:22-cv-0778 AC

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF No. 2. Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
2 § 1915(b)(2).

3 II. Statutory Screening of Prisoner Complaints

4 The court is required to screen complaints brought by prisoners seeking relief against "a
5 governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a).
6 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
7 "frivolous, malicious, or fail[] to state a claim upon which relief may be granted," or that "seek[]
8 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

9 A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact."
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
11 Cir. 1984). "[A] judge may dismiss . . . claims which are 'based on indisputably meritless legal
12 theories' or whose 'factual contentions are clearly baseless.'" Jackson v. Arizona, 885 F.2d 639,
13 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as
14 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a
15 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.
16 Franklin, 745 F.2d at 1227-28 (citations omitted).

17 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the
18 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of
19 what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550
20 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
21 "Failure to state a claim under § 1915A incorporates the familiar standard applied in the context
22 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." Wilhelm v. Rotman,
23 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure
24 to state a claim, a complaint must contain more than "a formulaic recitation of the elements of a
25 cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the
26 speculative level." Twombly, 550 U.S. at 555 (citations omitted). "[T]he pleading must contain
27 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
28 cognizable right of action." Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur

1 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
3 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
4 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
5 content that allows the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this
7 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.
8 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the
9 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,
10 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

11 III. Complaint

12 At all times relevant to the allegations in the complaint, plaintiff was a prisoner at the
13 Sierra Conservation Center. Plaintiff sues the California Correctional Health Care Services
14 (“CCHCS”) and three individual medical staff at the Sierra Conservation Center who were
15 deliberately indifferent to his serious medical needs.

16 Specifically, plaintiff alleges that on May 18, 2020, defendant Eisen, a medical assistant,
17 performed a lavage of plaintiff’s left ear even though she was not a registered nurse and had not
18 performed one before. She forcefully jammed a syringe into plaintiff’s left ear rupturing the
19 eardrum and causing him extreme pain. Defendant Eisen ignored plaintiff’s complaints of pain
20 and stuck the syringe filled with water into his left ear on two separate occasions. When plaintiff
21 returned to his cell he started having headaches and woke up the next day with a fever and severe
22 ear pain. On May 22, 2020, defendant Dr. Sommer examined plaintiff’s left ear and observed
23 that his eardrum was red and swollen and leaking fluid. Dr. Sommer prescribed plaintiff
24 antibiotics to treat his left ear. Upon follow-up with an unnamed ear specialist, plaintiff was
25 given a hearing aid due to hearing loss in his left ear. According to the complaint, the CCHCS
26 failed to ensure adequate staffing or qualified staffing to perform the necessary ear lavage
27 procedure.

28 Plaintiff seeks declaratory relief as well as monetary and punitive damages.

1 IV. Legal Standards

2 The following legal standards are provided based on plaintiff's pro se status as well as the
3 nature of the allegations in the complaint.

4 A. Supervisory Liability

5 Government officials may not be held liable for the unconstitutional conduct of their
6 subordinates under a theory of respondeat superior. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009)
7 (“In a § 1983 suit ... the term “supervisory liability” is a misnomer. Absent vicarious liability,
8 each Government official, his or her title notwithstanding is only liable for his or her own
9 misconduct.”). When the named defendant holds a supervisory position, the causal link between
10 the defendant and the claimed constitutional violation must be specifically alleged; that is, a
11 plaintiff must allege some facts indicating that the defendant either personally participated in or
12 directed the alleged deprivation of constitutional rights or knew of the violations and failed to act
13 to prevent them. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Taylor v. List, 880 F.2d
14 1040, 1045 (9th Cir. 1989); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978).

15 B. Linkage

16 The civil rights statute requires that there be an actual connection or link between the
17 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
18 Monell v. Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
19 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a
20 constitutional right, within the meaning of section 1983, if he does an affirmative act, participates
21 in another's affirmative acts or omits to perform an act which he is legally required to do that
22 causes the deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th
23 Cir. 1978) (citation omitted). In order to state a claim for relief under section 1983, plaintiff must
24 link each named defendant with some affirmative act or omission that demonstrates a violation of
25 plaintiff's federal rights.

26 C. Eleventh Amendment

27 The Eleventh Amendment serves as a jurisdictional bar to suits brought by private parties
28 against a state or state agency unless the state or the agency consents to such suit. See Quern v.

1 Jordan, 440 U.S. 332 (1979); Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Jackson v.
2 Hayakawa, 682 F.2d 1344, 1349-50 (9th Cir. 1982).

3 V. Claims for Which a Response Will Be Required

4 Plaintiff has adequately alleged an Eighth Amendment deliberate indifference claim
5 against defendant Eisen.

6 VI. Failure to State a Claim

7 The complaint does not sufficiently state any claim against defendants Sommer,
8 Whichard, and the CCHS, for multiple reasons. First, plaintiff names Dr. Sommer as a defendant
9 based only on his supervisory capacity over defendant Eisen. However, that is not a sufficient
10 basis for liability in this § 1983 action. See Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009).
11 Secondly, plaintiff does not identify any action taken by defendant Whichard to treat his left ear.
12 Therefore, this defendant is not adequately linked to any asserted constitutional violation. Lastly,
13 the CCHCS is immune from monetary damages since it is a state agency and California has not
14 consented to suit. See Palmer v. California Correctional Healthcare Services, No. 2:16-cv-1528-
15 MCE-CKD-P, 2016 WL 4524884 at *2 (E.D. Cal. Aug. 30, 2016) (finding both CDCR and
16 CCHCS are immune from suits for damages as state agencies under the Eleventh Amendment).
17 Therefore, the undersigned finds that the complaint does not adequately allege a cognizable claim
18 against these defendants.

19 VII. Leave to Amend

20 For the reasons set forth above, the court finds that the complaint does not state
21 cognizable claims against defendants Sommer, Whichard, and the CCHCS. However, it appears
22 that plaintiff may be able to allege facts to remedy this and he will be given the opportunity to
23 amend the complaint if he desires. Plaintiff may proceed forthwith to serve defendant Eisen on
24 his Eighth Amendment deliberate indifference claim or he may delay serving any defendant and
25 amend the complaint.

26 Plaintiff will be required to complete and return the attached notice advising the court how
27 he wishes to proceed. If plaintiff chooses to amend the complaint, he will be given thirty days to
28 file an amended complaint. If plaintiff elects to proceed on his claims against defendant Eisen

1 without amending the complaint, the court will proceed to serve the complaint. A decision to go
 2 forward without amending the complaint will be considered a voluntarily dismissal without
 3 prejudice of defendants Sommer, Whichard, and the CCHCS.

4 If plaintiff chooses to file an amended complaint, he must demonstrate how the conditions
 5 about which he complains resulted in a deprivation of his constitutional rights. Rizzo v. Goode,
 6 423 U.S. 362, 370-71 (1976). Also, the complaint must allege in specific terms how each named
 7 defendant is involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981).
 8 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or
 9 connection between a defendant's actions and the claimed deprivation. Id.; Johnson v. Duffy,
 10 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague and conclusory allegations of official
 11 participation in civil rights violations are not sufficient." Ivey v. Bd. of Regents, 673 F.2d 266,
 12 268 (9th Cir. 1982) (citations omitted).

13 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make
 14 his amended complaint complete. Local Rule 220 requires that an amended complaint be
 15 complete in itself without reference to any prior pleading. This is because, as a general rule, an
 16 amended complaint supersedes any prior complaints. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
 17 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th
 18 Cir. 2012) (claims dismissed with prejudice and without leave to amend do not have to be re-pled
 19 in subsequent amended complaint to preserve appeal). Once plaintiff files an amended complaint,
 20 any previous complaints no longer serve any function in the case. Therefore, in an amended
 21 complaint, as in an original complaint, each claim and the involvement of each defendant must be
 22 sufficiently alleged.

23 VIII. Plain Language Summary of this Order for a Pro Se Litigant

24 Your request to proceed in forma pauperis is granted. That means you do not have to pay
 25 the entire filing fee now. You will pay it over time, out of your trust account.

26 Some of the allegations in the complaint state claims against the defendants and some do
 27 not. The complaint adequately alleges an Eighth Amendment deliberate indifference claim
 28 against defendant Eisen. The CCHCS is immune from liability for monetary damages because it

1 is a state agency. The claims against defendants Sommer and Whichard do not adequately link
2 them to any violation of your constitutional rights. Therefore, service is not appropriate at this
3 juncture with respect to defendants Sommer, Whichard and the CCHCS.

4 You have a choice to make. You may either (1) proceed immediately on your Eighth
5 Amendment deliberate indifference claim against defendant Eisen and voluntarily dismiss the
6 other defendants or (2) try to amend the complaint. If you want to go forward without amending
7 the complaint, you will be voluntarily dismissing without prejudice your claims against
8 defendants Sommer, Whichard, and the CCHCS. If you choose to file an amended complaint, it
9 must include all claims you want to bring. Once an amended complaint is filed, the court will not
10 look at any information in the original complaint. **Any claims and information not in the first**
11 **amended complaint will not be considered.** You must complete the attached notification
12 showing what you want to do and return it to the court. Once the court receives the notice, it will
13 issue an order telling you what you need to do next (i.e. file an amended complaint or wait for
14 defendants to be served).

15 In accordance with the above, IT IS HEREBY ORDERED that:

16 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) is GRANTED.

17 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
18 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
19 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
20 appropriate agency filed concurrently herewith.


21 3. The complaint does not sufficiently allege a claim upon which relief can be granted
22 against defendants Sommer, Whichard, and the CCHCS.

23 4. Plaintiff has the option to proceed immediately on his Eighth Amendment deliberate
24 indifference claim against defendant Eisen as set forth in Section V above, or to amend the
25 complaint.

26 5. Within fourteen days of service of this order, plaintiff shall complete and return the
27 attached form notifying the court whether he wants to proceed on the screened complaint or
28 whether he wants to file an amended complaint. If plaintiff does not return the form, the court

1 will assume that he is choosing to proceed on the complaint as screened and will recommend
2 dismissal without prejudice of defendants Sommer, Whichard, and the CCHCS.

3 DATED: December 20, 2024

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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Defendants.

No. 2:22-cv-00778-AC

NOTICE OF ELECTION

Check one:

_____ Plaintiff wants to proceed immediately on his Eighth Amendment deliberate indifference claim against defendant Eisen without amending the complaint. Plaintiff understands that by going forward without amending the complaint he is voluntarily dismissing without prejudice defendants Sommer, Whichard, and the CCHCS pursuant to Federal Rule of Civil Procedure 41(a).

_____ Plaintiff wants to amend the complaint.

DATED: _____

Ernest Demetrius Evans
Plaintiff pro se